

E-HEARING / VIDEO HEARING

This short memo is not intended to be exhaustive but rather aims at listing some ideas which may help arbitrators and counsels to prepare and conduct a video hearing (or to be more in line with current terminology we will call it an *E-hearing*) in the best possible way.

In particular, we have not addressed here the questions of the platform or the technical aspects of the video-system, nor issues related to security and confidentiality. The idea is rather to provide practical examples of things we have learned during, and might not have thought of prior to, E-hearings.

(1) The preparation of the hearing

Pre-hearing session and test

It is a common practice in arbitration to organise a pre-hearing conference call. Usually the pre-hearing call is used to discuss questions of organisation, logistics and the schedule of the hearing. This pre-hearing step is even more important in case of E-hearings.

Any pre-hearing call should ideally be conducted in video in the presence of the parties' counsels, and the parties themselves if they cannot be at the same place during the E-hearing. This is the best possible way to ensure that the participants in the hearing will have the appropriate materials and connection. If feasible, it would be even better if test calls could also be made to the experts and witnesses who will be heard during the E-hearing.

This type of pre-hearing session essentially allows the organiser and the participants to make any necessary adjustments and adaptations during this test, instead of wasting precious time dealing with technical issues at the beginning of the hearing.

Acceptance by the parties and responsibilities of the parties

Considering the particular nature of an E-hearing, it is advisable to have the parties acknowledge and agree in writing to some key specific procedural elements. Each party should therefore sign an agreement confirming (at least) that:

- a. videoconferencing constitutes an acceptable means of communication permitted by the applicable rules, including those at the seat of the arbitration;
- b. the parties have agreed to the use of videoconferencing as the means for conducting the arbitral hearing;
- c. the parties agree that the fact that the hearing is being conducted virtually will not be used as a ground to challenge the result of the hearing and that no party will seek to annul any arbitral award on the basis that the arbitral hearing was not held (physically) in person.

This document could also include other procedural rules such as:

- a. the tribunal may record any or all of the hearing, provided it alerts the parties in advance that it will do so.
- b. other than the tribunal, no one is allowed to record any part of the hearing without the written authorisation of the tribunal;
- c. only the parties and representatives announced to the tribunal may be allowed to take part in the hearing.

The Parties should also agree on a specific breakdown management procedure and fall-back solutions, for instance: should the hearing be cancelled or continued without video or via phone?

Ideally, this agreement should be signed after the pre-hearing/test session has been successfully conducted between the Tribunal and Parties.

(2) The Hearing

Due process considerations

In order to ensure that due process (in particular the right to be heard) can be observed and achieved, there are minimum requirements and considerations that should be taken into account.

First of all, the Parties shall arrange for and test their own video and audio capabilities and shall use best efforts to ensure that the connection is as smooth as possible, with sounds and images being accurately and properly aligned so as to minimise any delays.

The parties shall take all practicable steps to ensure the confidentiality of the proceeding. In particular, no person should have access to the live video and/or audio feed of the hearing other than authorised participants.

The arbitral tribunal should ensure there are other means of communication for all participants (by mobile phone for instance) including parties, parties' representatives, witnesses and experts. This will be indeed an absolute necessity in the event a connection is lost.

At the beginning of the hearing, it is essential for the arbitral tribunal to emphasise the following:

- a. Any participant shall inform the tribunal immediately (by way of a predefined procedure) in case of:
 - Issues with the system or the connection; or
 - Difficulty to understand another participant.

Should the concerned participant not inform the tribunal immediately, it will be considered that all participants have complete access to the debate.

- b. The parties shall ask for a break each time they need to discuss between themselves or for any other reason (the system used should allow the parties to temporarily use the *mute* button and the parties should be advised to ensure this is done).

The arbitral tribunal should make sure it can verify the identity of the participants, if they are not known by both parties, including witnesses and experts: e.g. showing IDs to the camera or as scanned documents.

During the hearing, the participants shall always be in view of the camera.

The hearing process shall ensure equal chances for parties to present their case during the hearing. In that sense, it is important to inform the parties that the hearing may be suspended or terminated if the videoconferencing will result in unfairness to a particular party.

The presiding arbitrator (or the tribunal-designated assistant) shall operate the "mute" function on the audio feed, and pause the proceedings and determine the appropriateness of any participants' contribution at the time in question. In particular, if one of the parties or the person speaking loses connectivity and reports it through a designated communication system, the presiding arbitrator shall request that the rest of the attendees remain silent until the connectivity is restored.

In case of a breakdown, the tribunal shall decide how to continue (or to end the hearing) on the basis of the agreed breakdown management procedure.

Exhibits/documents

The tribunal and the parties should outline how and when they will exchange documents during the hearings (if necessary), including the means for providing exhibits to be used during cross-examination to witnesses, opposing counsel and the tribunal.

Ideally the platform used should include a mechanism to display documents on the screen so that all participants can see such documents simultaneously.

Witness examination

Each party should be responsible for ensuring that the witnesses they have called are familiar with the chosen platform and have suitable equipment to participate in the e-hearing.

It is particularly important for witness examination that the video conferencing system allows a reasonable part of the interior of the room in which the witness is located to be shown on screen, while retaining sufficient proximity to clearly depict the witness. During the examination, the witness shall always be in view of the camera. The tribunal could consider requesting the witness to add a camera in order to provide a view of the entire room.

The witness shall give his/her evidence sitting at an empty desk or standing at a lectern, and the witness's face shall be clearly visible.

Interpreters

Each party should also be responsible for ensuring that their interpreters are familiar with the chosen platform and have suitable equipment to participate in the e-hearing.

It is recommended that the interpretation be consecutive and not simultaneous. This will allow to have both the original and the translated discussion on record.

Post-hearing briefs

In case of E-hearings, it may be useful to allow the parties to provide post-hearing briefs – this will allow them to complete or clarify a position expressed during the hearing. This will also give a guarantee for the tribunal that the position expressed by a party during the hearing has been fully understood.

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E-hearings are working well and are an efficient, modern and cost-effective way to conduct hearings.

If this trend continues, E-hearings in international arbitration might well become a new standard for small and medium proceedings where the limitation of the arbitration costs and timing might be particularly essential.

On the other hand, it is doubtful that such system will be an appropriate substitute or at least as efficient as traditional hearings for larger and more complex proceedings.

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